Supreme Court, U.S.
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No. 01-997

IN THE

Supreme Court of the United States

ANN MARK,

Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, NEW YORK STATE COMMON RETIREMENT FUND AND NEW YORK CITY PENSION FUNDS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED

In a securities fraud class action asserting claims under § 11 of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act of 1934, based on the factual record of this case, did the district court abuse its descretion in approving the Lead Plaintiff's proposed plan of allocation for distribution of settlement proceeds that provides for each member of the Class to receive his or her *pro rata* share of the net settlement proceeds, and ensures that Class members with both §§ 11 and 10(b) claims are afforded the greater of the damages under the two provisions?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
RESPONDENTS' BRIEF IN OPPOSITION	1
COUNTER-STATEMENT OF THE CASE	1
A. Background of the Action	2
B. Appointment of Lead Plaintiff	3
C. The Pleadings	4
D. Discovery	6
E. Settlement Negotiations	7
F. The Settlements	8
1. The Cendant Settlement	8
2. The E&Y Settlement	8
G. The Plan of Allocation	8
H. Fairness Hearing and District Court Approval	11
I. The Court of Appeals' Affirmance of District Court Approval	12
ARGUMENT	15
THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI	15
I. The Third Circuit's Affirmance Of The Plan Of Allocation Does Not Conflict With Any Decision Of This Court Or Any Appeals Court, And Is Not Entitled To Review By This Court	17

TABLE OF CONTENTS

Page

II. The Third Circuit's Ruling Does Not Violate Rule 23 Nor Does It Conflict With Any Decision Of This Court Or Any Court Of Appeals 21

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: **Page**

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971) 16

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), *aff'g, Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) 16, 25, 26, 27

Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975) 24

Class Plaintiffs v. City of Seattle, 955 F.2d 1268 (9th Cir. 1992) 18

Danis v. USN Communications, Inc., 189 F.R.D. 391 (N.D. Ill. 1999) 24-25

Dietrich v. Bauer, 192 F.R.D. 119 (S.D.N.Y. 2000) . . . 24

Eichenholtz v. Brennan, 52 F.3d 478 (3d Cir. 1995) . . 24

Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) 15

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 28

Hanover Potato Prods. v. Shalala, 989 F.2d 123 (3d Cir.1993) 16

Hartley v. Stamford Towers Limited Partnership, 36 F.3d 1102 (9th Cir. 1994) (unpublished opinion 1994 WL 463497) 24

In re Cendant Corp. Litig., 264 F.3d 286 (3d Cir. 2001) 12

In re Cendant Corp. Litig., 60 F. Supp.2d 354 (D.N.J. 1999) 5-6

In re Cendant Corp. Litig., 109 F. Supp.2d 273 (D.N.J. 2000) 12

In re Cendant Corp. PRIDES Litig., 51 F. Supp.2d 537 (D.N.J. 1999) 14, 20, 21

In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) . . . 27

TABLE OF AUTHORITIES

Cases: **Page**

In re Jiffy Lube Sec. Litig., 927 F.2d 155 (4th Cir. 1991) 24

In re Oracle Sec. Litig., No. C-90-0931-VRW, 1994 WL 502054 (N.D. Cal. June 18, 1994) 15, 17, 18

In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) 15, 24

In re Westinghouse Sec. Litig., 90 F.3d 696 (3d Cir. 1996) 24

Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999) 26-27

Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999) 22, 23, 27-28

Rodney v. KPMG Peat Marwick, 143 F.3d 1140 (8th Cir. 1998) 24

Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956 (3d Cir. 1983) 16, 23

Weinberger v. Thornton, 114 F.R.D. 599 (S.D. Cal. 1986) 25

Yeager v. Cendant Corp., 109 F. Supp.2d 225 (D.N.J. 2000) 14, 15, 19, 20

Other Authorities:

7A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1769 at 367 (2d ed. 1986) 23

Private Securities Litigation Reform Act of 1995

15 U.S.C. § 77k(e)) 13

15 U.S.C. § 78u-4 3

15 U.S.C. § 78u-4(b)(3)(B) 5

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, respondents, California Public Employees' Retirement System, New York State Common Retirement Fund and New York City Pension Funds, submit this brief in opposition to the petition for a writ of certiorari.

COUNTER-STATEMENT OF THE CASE

This case presents the highly fact intensive and case-specific issue of whether the district court abused its discretion in approving a particular plan of allocation for distribution of settlement proceeds in the securities fraud class action brought on behalf of purchasers of publicly traded securities of Cendant Corporation ("Cendant") and its predecessor, CUC International, Inc. ("CUC"), *In re Cendant Corp. Litigation*, No. 98-CV-1664 (D.N.J.) (*"Cendant"*). The plan was approved by the district court and affirmed by the court of appeals along with the underlying settlements that achieved a recovery of more than $3.18 billion for the *Cendant* Class.

Petitioner contends that the plan was unreasonable because it failed to provide an enhanced recovery for certain Class members with claims arising under both § 11 of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act of 1934 compared with Class members with claims arising only under § 10(b).

In an effort to buttress petitioner's position, she further posits that an irreconcilable "conflict" arose within the certified Class after the settlements were achieved that required a separate counsel – not coincidentally, petitioner's counsel – to be appointed to represent the interests of Class members with § 11 claims, in order to "negotiate" a plan of allocation that provided such Class members with an enhanced recovery. However, as petitioner conceded below, that was not an essential element of her objection to the plan of allocation, clearly stating that even if a separate

plaintiff with separate counsel had been appointed, the plan of allocation "would still be objectionable."

The petition does not present any issue worthy of review by this Court. It does not challenge the approval of the settlements below, which petitioner acknowledges is "the largest settlement of a securities class action in history." Petition at 2. Rather, the petition challenges only the allocation plan for distribution of the settlement proceeds in this case, and does so on grounds that are completely dependent on the specific facts of this case. Moreover, the rulings of the courts below do not conflict with any decision of this Court, and there is no split among the circuit courts to be resolved. The petition raises no question of statutory interpretation that would even be relevant to other securities class actions.

The petition presents no issues suitable for this Court's review. It is an after-the-fact attempt to exploit the extensive work of Class counsel, which resulted in a record recovery for the *Cendant* Class, and to seize a disproportionate share of the settlement proceeds for a select group of Class members. The district court and Third Circuit correctly rejected this gambit.

A. Background of the Action

Cendant was formed through the merger of CUC International, Inc. ("CUC") and HFS Incorporated ("HFS") on December 17, 1997, pursuant to which holders of HFS common stock acquired 2.4031 shares of newly issued CUC common stock in exchange for each share of HFS stock (the "Merger"). CUC remained as the surviving company following the Merger and its name was changed to Cendant. Pet. App. 154a.

The action arises from a series of materially false and misleading public statements made first by CUC and then by Cendant during the period from May 31, 1995 through August 28, 1998 (the "Class Period"), which reported fraudulently inflated quarterly and annual financial results.

On April 15, 1998, Cendant first announced that it would restate its previously reported financial results for 1997 by approximately $0.11 to $0.13 per share because of accounting irregularities related to business segments of CUC. Pet. App. 154a. Cendant also stated that the Company's Audit Committee had retained an outside law firm as special legal counsel to investigate the accounting irregularities, assisted by an independent accounting firm.

On July 14, 1998, Cendant announced that it would restate CUC's annual and quarterly financial statements not just for 1997, as previously disclosed, but for 1995 and 1996; that the amount by which the 1997 financial statements had been overstated was more than double the original estimate revealed on April 15; and that a widespread and systemic fraud had occurred at CUC. Pet. App. 155a. On August 28, 1998, the Company filed with the SEC a 260-page report prepared by the independent law firm and public accounting firm, which further detailed the pervasive fraud that had corrupted 17 of CUC's 22 operating units, and had caused CUC's operating income to be inflated by approximately $500 million during the Class Period. *Id.* The report found that CUC's and Cendant's fraudulent accounting practices were carefully planned to ensure that CUC met or exceeded analysts' expectations.

The April 15, July 14 and August 28, 1998 announcements caused the market prices of Cendant's common stock to decline by 47%, 9% and 11%, respectively. Pet. App. 11a-12a. Over 60 securities fraud class action lawsuits were filed as a result of the disclosures. Pet. App. 12a.

B. Appointment of Lead Plaintiff

By Order entered June 1, 1998, the district court consolidated all class cases in one consolidated action (the "Action"). Numerous motions were made for appointment as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4. There were applications for separate representation of different claims, different securities and different portions of the

Class Period. In accordance with the PSLRA, the district court found that the CalPERS Group (respondents herein), which suffered a collective loss in excess of $89 million, had the largest financial interest in the relief sought by the Class and appointed them, as a group, as Lead Plaintiff for all purchasers or acquirers of CUC and Cendant publicly traded securities other than PRIDES. Pet. App. 264a – 286a.[1]

C. The Pleadings

Lead Plaintiff/respondents filed an Amended and Consolidated Class Action Complaint (the "Complaint") on December 14, 1998. The Complaint alleged violations of §§ 11 and 15 of the Securities Act of 1933 (the "Securities Act") and §§ 10(b), 14(a), 20(a) and 20A of the Securities Exchange Act of 1934 (the "Exchange Act"), and sought certification of a single Class consisting of persons and entities who purchased or acquired publicly traded securities of Cendant and CUC except Cendant PRIDES from May 31, 1995 through August 28, 1998 (the "Class Period"), with the exception of defendants and certain affiliated persons. Defendants were Cendant; certain former directors and officers of CUC and HFS, and CUC's outside accounting firm, Ernst & Young LLP ("E&Y"). Pet. App. 155a – 158a. Petitioner Mark affirmatively joined in the Complaint, claiming damages from purchases of Cendant stock both in the Merger (the basis for her §§ 11 and 10(b) claims) and on the open market (the basis for additional § 10(b) claims).

The Complaint asserted a continuing fraud based, *inter alia*, on the materially overstated financial statements issued by CUC and Cendant. Based in part on Cendant's disclosures on April 15, July 14, and August 28, 1998, and the Restatements of financial statements filed thereafter,

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1. The district court segregated the claims of PRIDES purchasers into a separate action because it determined that respondents had more than immaterial investments in the common stock of one of the underwriters of the PRIDES offering, Merrill Lynch, which could have been a defendant in the PRIDES purchasers' § 11 claim. *Id.* The district court rejected all other applications for a carve-out.

the Complaint alleged the overstatements were intentionally made to ensure that the reported results met or exceeded analysts' expectations, thereby artificially inflating the market price of CUC and Cendant stock during the Class Period. *Id.* The same overstatements of CUC's financial statements during 1995, 1996 and the first three quarters of 1997 that provided the basis for the claim that defendants artificially inflated the price of CUC stock prior to the Merger also constituted the primary basis for the claim that the registration statement for the Merger was materially false and misleading.

Contemporaneously with filing the Complaint, Lead Plaintiff also moved (i) to certify the Action as a class action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, and (ii) for partial summary judgment on liability only on the plaintiffs' claim against Cendant under § 11. Various defendants stated their intent to move to dismiss the Complaint, which would have automatically stayed all pre-trial discovery. *See* PSLRA, 15 U.S.C. § 78u-4(b)(3)(B). However, Lead Plaintiff obtained Cendant's agreement to begin document discovery immediately in exchange for Lead Plaintiff's agreement to temporarily suspend its motion for partial summary judgment on liability. Absent this agreement, discovery would not have commenced for at least six months.

Lead Plaintiff also obtained Cendant's consent to class certification. The motion was opposed by defendant E&Y, however, and it was only after Lead Plaintiff filed a reply brief, refuting each of the arguments raised by E&Y, that E&Y withdrew its opposition. The district court granted the class motion by Order entered January 28, 1999.

Certain defendants answered the Complaint denying all liability, while others moved to dismiss. After a hearing on July 8, 1999, the district court denied all of the motions to dismiss, except the court granted E&Y's motion to dismiss claims by persons who purchased Cendant securities after April 15, 1998, the date Cendant announced that E&Y's auditors' reports could no longer be relied upon. *In re*

Cendant Corp. Litig., 60 F. Supp.2d 354 (D.N.J. 1999). The moving defendants' subsequent answers to the Complaint denied any wrongdoing and asserted numerous defenses.

On August 6, 1999, the district court approved a Notice of Pendency of Class Action that was mailed to class members on October 8, 1999, and a Summary Notice of Pendency of Class Action that was published on October 18, 19 and 20, 1999, in *The Wall Street Journal*, in *The New York Times* and on the *PR Newswire*. The Notice of Pendency described the Action, the defendants and the claims asserted, and informed class members of the December 27, 1999 deadline to exclude themselves from the Class. Over 260,000 Notices of Pendency were mailed out; only 234 class members, or less than 1/10th of 1% of the Class, chose to opt out.

D. Discovery

Before formal discovery commenced, Lead Counsel reviewed voluminous public filings, articles and analyst reports concerning CUC, HFS and Cendant; all of CUC's and Cendant's financial statements and restatements; and the report to the Cendant Audit Committee and all exhibits thereto. Lead Counsel investigated Cendant, the individual defendants, E&Y and the senior E&Y personnel on the CUC audits and reviews, and conducted interviews with many former employees of CUC, HFS and E&Y. Lead Counsel received and analyzed all of the documents that Cendant had provided for the Audit Committee's investigation. Expert forensic accountants were retained to assist Lead Counsel in their review of the Audit Committee report, all exhibits thereto, and all other accounting documents.

Once formal discovery started, Lead Counsel served document requests and interrogatories on all defendants and served document subpoenas on relevant non-parties. Among the hundreds of thousands of documents reviewed were additional Cendant records, E&Y's audit and quarterly review working papers, records of the individual defendants, and documents produced by various non-parties, including

HFS's financial advisor for the Merger and the Audit Committee investigators.

E. Settlement Negotiations

To prepare for settlement negotiations, Lead Counsel retained investment bankers, Lazard Frères & Co. LLC ("Lazard"), and Arthur S. Ainsberg, as financial consultants. Lazard analyzed the business and financial condition of Cendant, and advised Lead Plaintiff and Lead Counsel about the likely impact that potential settlements would have on Cendant.

Lead Counsel also worked with a damages expert, Forensic Economics, Inc., to gain a thorough understanding of the Class's damages. Forensic Economics performed extensive research concerning Cendant, CUC and HFS, and prepared various analyses of possible recoverable damages. Lead Counsel also obtained the damage analyses prepared by Cendant's damages expert, National Economic Research Associates ("NERA"), in which NERA analyzed and critiqued Forensic Economics' damages analyses.

Lead Counsel conducted hard-fought, arms' length settlement discussions with Cendant and the HFS Individual Defendants over a six-month period beginning June 1999, during which counsel for these defendants strongly disputed the analyses and conclusions of Lead Plaintiff's financial consultant, and raised sharp disagreements with plaintiffs' damages calculation and each of its components. Later during the summer of 1999, Lead Counsel commenced settlement discussions with E&Y, which similarly challenged Lead Plaintiff's damages theory and further maintained that E&Y's conduct did not cause any damage to the Class.

By December, Lead Plaintiff was successful in reaching the essential terms of agreements with Cendant and the HFS Individual Defendants, and with E&Y, which were announced on December 7 and 17, 1999, respectively. After several additional months of negotiating the terms

necessary to effectuate the agreements and formulating the plan of allocation, settlement stipulations were executed and filed with the district court.

F. The Settlements

The settlements were designed to resolve all of the Class's claims against all defendants in the Action.

1. The Cendant Settlement

The Cendant settlement includes three primary elements:

1. A cash payment by Cendant of $2,851,500,000 with interest accruing since August 20, 2000. There is no reversion to Cendant of the settlement amount.

2. Cendant and the HFS Individual Defendants pay 50% of any net recovery they obtain from E&Y on claims they are litigating against E&Y.

3. Cendant agreed to institute significant corporate governance improvements, including: constituting Cendant's Board of Directors with a majority of independent directors; constituting the Audit, Nominating and Compensation Committees of the Board entirely with independent directors; and other relief.

In exchange, class members released Cendant and all of the individual defendants (whether previously associated with HFS or CUC) from all claims that were or could have been filed in the Action.

2. The E&Y Settlement

In exchange for class members releasing E&Y from all claims that were or that could have been filed in the Action, E&Y paid $335,000,000 in cash. The entire settlement amount has been accruing interest since April 15, 2000 for the benefit of the Class.

G. The Plan of Allocation

Class members who suffered a loss from their purchases of Cendant or CUC publicly traded securities during the

Class Period, and who submitted a claim form with required documentation, will receive a distribution from the settlement fund, in accordance with the plan of allocation.

The plan was discussed extensively in the district court opinion approving the settlements and plan. Pet. App. 212a – 234a. As the court of appeals stated in its opinion affirming the settlements and plan:

> The record shows that the [district] court carefully considered the expert advice, and then chose to accept the plan submitted by the Lead Plaintiff's damages expert over the plan submitted by [another objector's] expert. This kind of decision is intensely fact-based, falling within the purview of the District Court's discretion. The District Court properly based its decision on evidence offered by the Lead Plaintiff, which provided more than a sufficient evidentiary basis for its decision. . . . We therefore find no abuse of the court's discretion in its decision to accept the Plan of Allocation.

Pet. App. 83a.

The plan provides that a "Loss Amount" will be calculated for each purchase or acquisition of a Cendant or CUC publicly-traded security. Particular Loss Amounts are based on the level of artificial inflation in the price of each CUC and Cendant publicly-traded security, as determined by Lead Plaintiff's damages expert.

In accordance with accepted methods of calculating damages for violations of § 10(b), the damages expert estimated the percentage of artificial inflation in the daily closing market prices for Cendant and CUC common stock and for publicly-traded notes that it could attribute to the alleged wrongdoing. It measured the percentage price decline associated with each particular disclosure, adjusted that price reaction to eliminate any effects attributable to general market or industry conditions, and then used standard statistical techniques to ensure that the price reaction was statistically significant. In this way, the expert

isolated the price effects caused by the fraud. *See generally* Pet. App. 212a – 234a.

By accumulating the total isolated market reaction attributable to each public disclosure, plaintiff's expert determined the reasonable amount of artificial inflation in the market price of CUC and Cendant common stock and in the price of publicly-traded notes, expressed as a percentage of each publicly-traded security's closing market price as of April 15, 1998. The expert allocated the total artificial inflation in each Cendant security as of April 15, 1998 back to each prior quarterly period. The expert then determined the reasonable amount of total artificial inflation for the periods from April 16, 1998 (the first day after Cendant's initial partial disclosure) through July 14, 1998 (the date of Cendant's next partial disclosure), and from July 15, 1998 through August 28, 1998 (the last day of the Class Period). The percentage of artificial inflation in the closing market price calculated for the two post-April 15, 1998 periods was then applied to the closing market prices for each day within those periods. *Id.*

The plan of allocation further recognizes the difference in claims under § 11 possessed by persons who acquired Cendant common stock in the Merger compared to claims under § 10(b) possessed by all Class members. For Class members who acquired shares in the Merger (and therefore have § 11 claims), the plan of allocation provides that Loss Amounts are the *greater* of either the § 10(b) damages described above, or as would be dictated by the statutory formula of § 11(e). *Id.*

As a general rule, the § 10(b) damages calculated under the plan of allocation are higher than the statutory damages under § 11(e). For instance, the plan of allocation provides Class members who acquired Cendant stock in the Merger and retained their stock until the end of the Class Period with a "Loss Amount," pursuant to the § 10(b) damages calculation, of $15.31 per share whereas their damages pursuant to § 11(e), based on the price of the stock at the time of the Merger versus the price on April 16, 1998, when

the first § 11 claim was filed, would be only $13.06 per share – $2.25 per share more than their § 11 damages. But, as a safeguard to Class members with § 11 claims, in the event that a Class member has a loss under § 11(e) that is greater than the amount calculated pursuant to the § 10(b) formula in the plan, the plan of allocation provides that *the greater damage amount is attributed to that claim.*

H. Fairness Hearing and District Court Approval

The district court granted preliminary approval to the settlements and plan of allocation on March 29, 2000. The court-approved Notice of Settlement of Class Action (the "Settlement Notice") was mailed to potential class members, and a Summary Notice of Settlement of Class Action was published in *The Wall Street Journal*, in *The New York Times* and on the *PR Newswire*. In all, more than 478,000 Settlement Notices were sent out.

The deadline for objections to the settlements and plan of allocation was May 31, 2000. Only three Class members objected to either of the settlements. One non-class member who had filed a derivative action on behalf of Cendant objected to the Cendant settlement. And petitioner Mark objected to the plan of allocation. Not one of the 1,700 institutional investors in this country that are members of the Class, and who acquired extremely large holdings of Cendant and CUC stock during the Class Period, including in the Merger, objected either to the settlements or to the plan of allocation. Pet. App. 163a.

The district court held a fairness hearing on June 28, 2000, at which all objectors and Lead Plaintiff were granted the opportunity to be heard. Petitioner Mark presented no evidence to support her contention that the plan of allocation was improper, and no competing plan.

On August 15, 2000, the district court entered two opinions and various judgments and orders approving the Cendant and E&Y settlements and the plan of allocation. In one opinion, the district court addressed and overruled the

objections of the derivative plaintiff. *In re Cendant Corp. Litig.*, 109 F. Supp.2d 273 (D.N.J. 2000). In the other, the district court addressed and overruled all other objections to the settlements and the plan. Pet. App. 153a.

I. The Court of Appeals' Affirmance of District Court Approval

On August 28, 2001, the court of appeals, per Becker, C.J., joined by Judges Sloviter and Ambro, affirmed the district court's approvals of the settlements and plan of allocation. The court considered the settlements and plan in accordance with well-established law in the Circuit and elsewhere, and rendered a detailed opinion rejecting each of the points raised by appellants. *See* Pet. App. 1a – 152a; *see also In re Cendant Corp. Litig.*, 264 F.3d 286 (3d Cir. 2001) (affirming rejection of derivative plaintiff's objections).

Summarizing petitioner's arguments and its conclusion that the district court acted well within its discretion in approving the plan of allocation, the court of appeals stated:

> One objector contends that the claims under § 11 of the Securities Act of 1933, which only a subset of the class possesses, are legally stronger than the other claims held by class members, i.e., claims under § 10(b) of the Securities Exchange Act of 1934. Based on this disparity, the objector argues that the § 11 claimants should receive a larger share of the settlement proceeds. We conclude, however, that the § 11 claims here are not necessarily legally stronger than the § 10(b) claims, and that, at any rate, the basis for measuring the different legal strengths of the claims involved is too speculative to support the objector's contention. We thus hold that the District Court did not abuse its discretion in approving a settlement allocation that treated all claims more or less equally.

Pet. App. 6a (emphasis added). The court continued:

> [T]here are several considerations that convince us that the District Court did not abuse its discretion in

approving the Plan of Allocation. First, the difference in the liability standards between § 11 and § 10(b) claims ultimately does not make a substantial difference in this case, as it is basically undisputed that Cendant's employees committed fraud, so the necessary scienter for the § 10(b) claims has been admitted. It is true that there is a possible issue of proportionate liability that arises with the § 10(b) claims, because Cendant has stated that it would raise the defense that the scienter of its employees cannot be attributed to Cendant itself. However, as we noted previously, *see supra* Part III.A.4 [Pet. App. 46a – 50a], based on the record before us we think that Cendant would have a very difficult time making out this defense.

Second, the real difficulty in the trial of this case would have been establishing damages, a process which both § 10(b) and § 11 claimants would have to undergo equally and which almost certainly would devolve into a "battle of the experts." Although § 11 claimants could at the outset calculate their damages rather simply (by subtracting the price of the stock at the time the lawsuit was brought from the amount that they paid for the stock, see 15 U.S.C. § 77k(e)), the defendant can counter this calculation by showing that any or all of this difference in stock price was caused by something other than the fraud, *see id.* Thus, on a § 11 claim there would still be a "battle of the damage experts;" the only difference between a § 11 and a § 10(b) damage determination in this case is that, on a § 11 claim, the defendant would bear the burden of disproving the plaintiff's straightforward subtraction calculation. . . .

Finally, it is also important to note that the § 10(b) damages available to the class members in this case are generally greater than the § 11 damages available, so that in this respect the § 10(b) claims are potentially stronger than the § 11 claims. . . . At all events and for all these reasons, we are chary of holding that the respective legal strengths of the § 10(b) and § 11 claims

> involved here should have been factored into the fairness of the settlement determination. This would be a speculative enterprise at best, and the differences in strength of these claims are not so great as to make the outcome of this process clear.

Pet. App. 73a – 75a (emphasis added).

The court of appeals further distinguished two other cases involving Cendant, *In re Cendant Corp. PRIDES Litig.*, 51 F. Supp.2d 537 (D.N.J. 1999), and *Yeager v. Cendant Corp.*, 109 F. Supp.2d 225 (D.N.J. 2000), cited by petitioner as "evidence" of her contention that there was a "conflict" that arose between Class members with § 11 claims and those without such claims:

> [T]he *PRIDES* settlement and the *Yeager* litigation are distinguishable. The *PRIDES* settlement involved a paper payout rather than a cash payout (i.e., the plaintiffs got new Cendant stock for their old stock), *see Cendant PRIDES*, 51 F.Supp.2d at 540, while the case at bar involves a cash payout. . . . Second, *PRIDES* was a "claims made" settlement, with unclaimed settlement funds reverting back to Cendant, *see id.* at 541; here all the settlement cash (and interest) will go to the Class. . . . [T]he "claims made" nature of the *PRIDES* settlement meant that Cendant could agree to a settlement in that case that gave a much higher percentage recovery to all potential class members, because it knew that it only had to pay out to those class members who actually made claims, which was certain to be a subset of the entire class. Not only does this mean that *PRIDES* is not "really" a settlement for 100% recovery (because less than 100% of the potential claimants will make a claim, thus lowering the amount Cendant must pay out), it also means that the settlement in this case is not "really" a settlement for 36% recovery (because less than 100% of the potential claimants will make a claim, thus raising the amount each claimant will receive). . . .

> As for *Yeager*, that case was not a class action (the plaintiff had opted out of this Class) and was for far less in damages, so any comparisons between *Yeager* and this case are flawed at best. Furthermore, as we note above, the district court partially denied Yeager summary judgment on his § 11 claims because there was a genuine issue of material fact as to the amount of damages.
>
> For the foregoing reasons, we reject Mark's arguments and conclude that the District Court did not abuse its discretion by approving a settlement that treated § 10(b) and § 11 claims more or less equally.

Pet. App. at 75a – 77a. Petitioner's request for panel rehearing with suggestion for rehearing *en banc* was denied. Pet. App. 287a.

Mark's petition to this Court followed.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

This case involves a highly fact-specific, record-dependent question that is not suitable for this Court's review. There is no direct circuit conflict or conflict with any of this Court's decisions.

The decision to approve a plan of allocation of settlement proceeds, like a decision to approve a proposed settlement of a class action, is left to the sound discretion of the district court. Under clear law in the Third Circuit and elsewhere, it will be reversed only "for a clear abuse of discretion." *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 299 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (citing *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975)); *In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054 (N.D. Cal. June 18, 1994) (plan of allocation). On appellate review of a district court's exercise of that discretion,

> [g]reat weight is accorded [the] views [of the trial judge] because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success.

Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 965 (3d Cir. 1983) (quoting *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971)).

Based on the abuse of discretion standard, a reviewing court will not interfere with the district court's exercise of discretion "unless there is a definite and firm conviction that the court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Hanover Potato Prods. v. Shalala*, 989 F.2d 123, 127 (3d Cir.1993).

In the present case, petitioner points to no such abuse of discretion or even any reason for this Court to review the decision of the court of appeals finding that there was no abuse of discretion. Notably, petitioner did not propose – in all her papers to the district court, to the court of appeals, and to this Court – a different plan of allocation from the one proposed by Lead Plaintiff. Petitioner merely asserted that the plan of allocation was flawed, and sought to be appointed as a lead plaintiff, with her counsel as lead counsel, to "negotiate" a better deal for Class members with § 11 claims. Pet. App. 72a. Yet, as stated in *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d at 964, a court's "principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund." The Third Circuit unanimously held, after reviewing the extensive factual record of this case, that petitioner's claim of unfair treatment was too "speculative" to be cognizable.

While petitioner argues here that the district court should have recognized that a "conflict" among Class members existed under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), she conceded in her brief to the court of appeals that: "The objection does not undo the settlement or require the defendants to pay more money. Plaintiff here simply seeks a reallocation of settlement funds from those

who do not have a Section 11 Claim to those who do, former HFS shareholders.[FN. 5]."[2]

Petitioner thus conceded below a vital distinction between *Amchem*, a case that involved a pre-packaged class settlement designed to release claims of persons with present injuries resulting from asbestos-exposure and those without any present injuries, and the case at bar – a securities class action in which the Class was certified as a litigation class, and all members of the Class shared common claims and suffered actual damages stemming from the defendants' admitted wrongful conduct.

I. The Third Circuit's Affirmance Of The Plan Of Allocation Does Not Conflict With Any Decision Of This Court Or Any Appeals Court, And Is Not Entitled To Review By This Court

Petitioner fails to cite a single case that required the plan of allocation to provide an enhanced recovery for Class members who had § 11 and § 10(b) claims over the recovery of Class members who had only § 10(b) claims. She further fails to address at all that the court of appeals appropriately applied well-settled law that a district court's approval of a plan of allocation may not be reversed unless the reviewing court determines that the district court abused its discretion in approving the plan.

Under Rule 23, approval of a plan for allocating settlement proceeds among class members is "governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate." *In re Oracle Sec. Litig.*, No. C-90-9031-VRW, 1994 WL 502054, at *1 (N.D. Cal. Jun. 18, 1994); *accord*

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2. Footnote 5 to Mark's Brief stated: "Should this Court reverse the District Court and reject the Plan of Allocation, it should also determine that plaintiff Ann Mark be appointed as a Lead Plaintiff on behalf of HFS Section 11 Claims and that the undersigned counsel be appointed as Lead Counsel on behalf of these claims in order to formulate and negotiate a new Plan of Allocation that adequately compensates the former HFS shareholders for their stronger Section 11 Claims."

Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1284-85 (9th Cir. 1992). "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle*, 1994 WL 502054, at *1.

As the court of appeals found, the plan of allocation approved by the district court was reasonable. Whether one set of claims was "stronger" than another, as postulated by petitioner, was highly speculative in the circumstances of this case. But, one thing was certain: the damages recoverable under § 10(b) – which the plan of allocation made available to Class members with § 11 claims – generally exceeded the damages recoverable under § 11. Thus, the district court acted well within its discretion in approving a plan of allocation that treated Class members with both § 11 and § 10(b) claims equally with members who had only § 10(b) claims, by providing the former with the ability to recover for the greater damages generally available under § 10(b).

Not only has petitioner failed to cite a single case that supports her position that § 11 claims are entitled to enhanced recoveries over § 10(b) claims in securities fraud class actions generally, but even if such an enhanced recovery might be appropriate in the circumstances of another case, the district court and court of appeals both cited reasons why no such enhanced recovery was required in the circumstances of this case. The court of appeals made no grand pronouncement applicable to any other situation. It merely concluded:

> that the § 11 claims here are not necessarily legally stronger than the § 10(b) claims, and that, at any rate, the basis for measuring the different legal strengths of the claims involved is too speculative to support the objector's contention.

Pet. App. 6a (emphasis added).

Cendant's admissions that certain former senior executives of CUC (Cendant's predecessor) had intentionally engaged in a massive fraud that overstated the

company's financial statements in order to impact the price of the company's stock were tantamount to admissions of the company's liability under both § 11 and § 10(b). Pet. App. 49a – 50a. Given the company's admissions of willful misconduct, the company would likely have been jointly and severally liable for all damages found against defendants, not just for its proportionate liability, although that risk existed. *Id.* Thus, in general, while it may be that claims brought pursuant to § 11 are "stronger" in the abstract than claims brought pursuant to § 10(b), in the particular circumstances of the case at bar, such differences were not significant. There is simply no basis or reason to review the ruling of the court of appeals that applied well-settled law to the specific facts of this *sui generis* case.

Petitioner's attempt to compare the *Cendant* Class case to *Yeager* is without merit. Most importantly, this is a class action, while *Yeager* was an individual action with claimed § 11 damages of $15.85 million *(see* 109 F. Supp.2d at 228) – less than ⅛th of 1% of the Class's damages. This alone prevents comparison of *Yeager* to this Action. As the court of appeals found:

> As for *Yeager*, that case was not a class action (the plaintiff had opted out of this Class) and was for far less in damages, so any comparisons between *Yeager* and this case are flawed at best.

Pet. App. 77a (emphasis added).

Indeed, a portion of Yeager's motion for a damages award on his § 11 claim was denied, based on the defendant's contrary proof of damages.[3] In *Yeager*, the individual plaintiff sold all of the Cendant stock he acquired in the

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3. Petitioner's attempt to ridicule the court of appeals by stating that it misread the district court's summary judgment opinion in *Yeager* (Pet. at 28) is misguided. The court of appeals clearly recognized that while the district court granted summary judgment to Yeager on his § 11 claim against Cendant on liability, the district court denied Yeager's motion for summary judgment, even on his § 11 claim, to the extent that Cendant presented contrary evidence on damages.

Merger after the initial disclosure of wrongdoing on April 15, and therefore, was able to calculate, with certainty, his *prima facie* § 11(e) damages. Pet. App. 242a & 245a – 246a. But, even though Yeager was able to "fix" his *prima facie* damages, the district court still awarded Yeager a judgment of less than 75% of his asserted damages, based on the defendant's contrary damages evidence. *See id.* Thus, petitioner's claim that Class members with § 11 claims could have obtained 100% of their damages by summary judgment is demonstrably false. Indeed, Class members who retained their stock acquired in the Merger until the end of the Class Period were greatly benefited from being able to calculate their losses based on their § 10(b) rather than their § 11 claim, and as the court of appeals found, the informal discovery that Lead Plaintiff obtained in return for deferring the summary judgment motion "produced information relevant to determining the Class's damages, which was beneficial to both the § 11 and § 10(b) claims." Pet. App. 74a.

The *PRIDES* settlement, also cited by petitioner, is inapplicable as well for a number of reasons: (a) the Class's damages of the *Cendant* Class were 25 times those suffered by the *PRIDES* Class; (b) the recovery was ten times the amount of the *PRIDES* settlement; (c) the *PRIDES* settlement included no cash at all but, rather, additional newly created Cendant securities; (d) the *PRIDES* Settlement was a "claims made" settlement, with unclaimed PRIDES reverting to Cendant; and (e) the PRIDES class received no interest. Pet. App. 181a – 182a.

Citing these reasons, the district court, which presided over both class actions, held that the settlements in this Action "cannot be compared to the *PRIDES* settlement." *Id.* The court of appeals concurred in the district court's determination that the *PRIDES* case is inapplicable:

> The *PRIDES* settlement involved a paper payout rather than a cash payout (i.e., the plaintiffs got new Cendant stock for their old stock), *see Cendant PRIDES*, 51 F.Supp.2d at 540, while the case at bar involves a cash

> payout. Second, *PRIDES* was a "claims made" settlement, with unclaimed settlement funds reverting back to Cendant, see id. at 541; here all the settlement cash (and interest) will go to the Class. This point is important because it means that unmade claims in this Settlement will increase the percentage return for each class member, while unmade claims in the *PRIDES* settlement did not increase each class member's return but instead decreased the amount that Cendant had to pay out. . . .
>
> Thus, the "claims made" nature of the PRIDES settlement meant that Cendant could agree to a settlement in that case that gave a much higher percentage recovery to all potential class members, because it knew that it only had to pay out to those class members who actually made claims, which was certain to be a subset of the entire class.

Pet. App. 75a – 77a.

There is no legal authority that supports the petitioner's claim that the approved plan was unreasonable or unfair to any Class member. Indeed, throughout all the proceedings below, petitioner never proposed an alternative plan. But, even if she had, as the court of appeals concluded, it would have been a "speculative enterprise at best" to determine whether the respective legal strengths of the § 10(b) and § 11 claims "should have been factored into the fairness of the settlement determination." Pet. App. 75a.

For all these reasons, neither the district court's approval of the plan of allocation, nor the ruling of the court of appeals that the district court did not abuse its discretion in approving the plan, is suitable for review.

II. The Third Circuit's Ruling Does Not Violate Rule 23 Nor Does It Conflict With Any Decision Of This Court Or Any Court Of Appeals

The decisions of the courts below rejecting petitioner's contention that an irreconcilable "conflict" arose with respect to allocation of the settlement proceeds is correct

and does not conflict with any decision of this Court or of any other court of appeals. Petitioner cites no decision of any court holding that the Lead Plaintiff or the district court was required to establish a separate class or sub-class for holders of § 11 claims. To the contrary, certification of a single class was entirely appropriate under Rule 23, and is consistent with numerous cases that have certified classes that include investors with both § 11 and § 10(b) claims. Further, creating such a sub-class in *Cendant* would have been particularly senseless because the fraud in this case was admitted by the primary corporate defendant, and the misstatements that made the registration statement for the Merger false and misleading, thereby providing the basis for viable causes of action under both § 11 and § 10(b), also provided the basis for § 10(b) claims for purchasers of CUC and Cendant stock and other publicly traded securities on the open market.[4]

Lead Plaintiff/ respondents had no conflict that disabled them from proposing an allocation plan that distributed settlement proceeds to § 11 claimants *and* to § 10(b) claimants. Pet. App. 184a – 186a. "[T]he interests of [class representatives] do not have to be identical to the interests of every class member; it is enough that they 'share common objectives and legal or factual positions.' " *Petrovic v. Amoco*

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4. Petitioner's own purchases of Cendant stock show that creating a separate sub-class for § 11 claimants would have been folly. Petitioner purchased 240 shares in the Merger (in exchange for 100 shares of HFS stock) and 400 shares on the open market. Pet. App. 31a. She joined in the Complaint filed in December 1998 in which plaintiffs (a) asserted both § 11 and § 10(b) claims, and (b) sought a single class comprised of all purchasers of Cendant and CUC publicly traded securities. Indeed, Mark's purchases of stock in the Merger and on the open market placed her in the same alleged "conflict" position that she claims made the Lead Plaintiff inadequate to serve as the representative of the unitary Class for purposes of proposing a plan of allocation. Yet, in her Objection and appeal, Mark asked those courts "to appoint her lead plaintiff, and her counsel as lead counsel, for a subclass composed of the class members with § 11 claims," *see* Pet. App. 72a (emphasis added), thus revealing her true motive for alleging a "conflict" where no genuine conflict existed.

Oil Co., 200 F.3d 1140, 1148 (8th Cir. 1999) (quoting 7A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1769 at 367 (2d ed. 1986)).

The alleged "conflict" in this case was not an actual conflict. As stated in *Walsh v. Great Atl. & Pac.*, 726 F.2d at 964, in the context of an objector arguing that class counsel should not have represented all members of the class in formulating an allocation plan: "disagreements over the proper division of a settlement fund do not necessarily create conflicts of interest requiring separate representation. . . . The court was required to and did consider whether class counsel provided fair and adequate representation to the class as a whole. There was no abuse of discretion in refusing to remove class counsel."

Here, Lead Plaintiff prosecuted the Action, from beginning to end, on behalf of the entire Class. Lead Plaintiff filed a complaint that protected the rights of all Class members; sought and obtained certification of a Class; opposed motions to dismiss and motions to stay proceedings that would have impacted adversely each Class member; sought formal and informal discovery that benefited all Class members; and engaged in intensive negotiations that resulted in landmark recoveries for the Class – recoveries over four times greater than any other securities class action case. Moreover, the Lead Plaintiff group entities each had § 11 and § 10(b) claims, just as did petitioner, and none had any personal interest in structuring an allocation plan that advantaged the latter at the expense of the former.

In *Petrovic*, a class member argued that there was an inherent conflict when the class representative proposed an allocation plan that treated class members differently. However, even in that circumstance, the court of appeals held that no conflict arose that required separate representation of various Class members. 200 F.3d at 1145-48. The same is true here. As long as the Class shared common claims that predominated over individual issues, there was no requirement, as the courts below found, that the Class be

sub-divided in formulating a plan of allocation – a result that presents *no conflict* with any decision of this Court or any other court of appeals.

In re Prudential, 148 F.3d 283, is also on point. There, the court of appeals approved a class settlement and the certification of a single 8 million member class in spite of an objector's argument that the class plaintiffs could not adequately represent them and had claims that were not typical of all claims of class members. As the court stated:

> [t]he named plaintiffs, as well as the members of the proposed class, all have claims arising from the fraudulent scheme perpetrated by Prudential. That overarching scheme is the linchpin of the Second Amended Consolidated Complaint.... Consequently, the factual distinctions among and between the named plaintiffs and the 8 million putative class members do not defeat a finding of typicality.

Id. at 311.

Courts have long held that a single plaintiff may represent purchasers with different claims without creating any conflict requiring separate representation. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975). Indeed, plaintiffs in securities class actions regularly represent class members with claims under the Securities Act (§§ 11 and 12(a)(2)) and those with claims under the Exchange Act (§ 10(b)). *E.g., In re Westinghouse Sec. Litig.*, 90 F.3d 696, 700, 701-02 (3d Cir. 1996) (upholding complaint for a single class that alleged claims under §§ 10(b), 11 & 12(a)(2)); *Eichenholtz v. Brennan*, 52 F.3d 478 (3d Cir. 1995) (affirming approval of settlement on behalf of class that alleged claims under §§ 10(b), 11 and 12(a)(2)); *accord Rodney v. KPMG Peat Marwick*, 143 F.3d 1140, 1143 (8th Cir. 1998); *Hartley v. Stamford Towers Limited Partnership*, 36 F.3d 1102 (9th Cir. 1994) (unpublished opinion at 1994 WL 463497); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 157 (4th Cir. 1991); *Dietrich v. Bauer*, 192 F.R.D. 119 (S.D.N.Y. 2000); *Danis v. USN Communications, Inc.*, 189 F.R.D. 391,

394-95, 398-99 (N.D. Ill. 1999); *Weinberger v. Thornton*, 114 F.R.D. 599, 603-04 (S.D. Cal. 1986).

Notwithstanding this long line of unbroken authority, petitioner asserts that *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997), *aff'g, Georgine v. Amchem Prod., Inc.*, 83 F.3d 610 (3d Cir. 1996), effected a "sea change" and requires courts to provide for sub-classes, with separate representation, when different class members have different claims.[5] Petitioner misreads *Amchem*.

In *Amchem*, the court of appeals, per Becker, C.J., concluded that a single class was not appropriate where certain class members had claims that had accrued at the time, while others had only potential future claims. This Court, in line with the analysis of the court of appeals, further considered that certification of the class in *Amchem* was effectuated for *settlement purposes only*. Noting that "[n]o settlement class called to our attention is as sprawling as this one," 521 U.S. at 624, this Court affirmed the denial of the proposed class. The Court highlighted the myriad differences among class members, particularly between those who had manifested injury and those who were *currently* uninjured:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only

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5. Petitioner's assertion that a "conflict" exists is belied by her own briefing to the court of appeals. In her Reply Brief, at 6, when confronted with Lead Plaintiff's answering brief on the asserted "conflict" issue, Mark wrote: "Mark is objecting to the Plan of Allocation. Her arguments relating to Lead Plaintiffs' conflicts and inadequate representation of Section 11 claimants simply proposed an explanation of what occurred here. Even if the District Court had properly appointed an independent plaintiff and counsel specifically to represent Section 11 claimants and that representation resulted in the present Plan of Allocation, *it would still be objectionable*. . . It is the Plan of Allocation that Mark is objecting to, not all of the preliminary proceedings that caused the Plan of Allocation." (Emphasis in original).

> asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma.... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Amchem, 521 U.S. 591 at 624. The Court thus affirmed the court of appeals' rejection of the pre-packaged class settlement, holding that the interests of the proposed class members were largely adverse to one another. *Id.* at 626.

There is no precedent for applying *Amchem* to this Action. Indeed, this Court distinguished the *Amchem* situation from a securities class action, stating: "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625. Moreover, Third Circuit Chief Judge Becker, the author of the decision in *Georgine v. Amchem*, certainly was aware of the reach, and limits, of this Court's *Amchem* decision, and concluded in the case below that there were overwhelming common issues shared by § 11 and § 10(b) claimants in this case. As the court noted, every § 11 claimant here *also* has a § 10(b) claim for the exchange of their shares, and the § 10(b) claim of such class members generally provides *greater damages* – which would necessarily have to be proven by expert testimony, and could not simply be assumed – than are available to those same Class members under their § 11 claims.[6]

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6. *See also Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 588 (3d Cir. 1999) (post-*Amchem* decision ruling that there was no abuse of discretion in district court's denial of objectors' motion at settlement stage for

Another key difference, of course, is that the class in *Amchem* was certified by agreement of the parties as a *settlement* class. *Amchem*, 521 U.S. at 601-02 ("The class action thus instituted was not intended to be litigated. Rather, . . . the settling parties . . . presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification."). While petitioner makes a half-hearted attempt to argue that the Class here should also be viewed as a settlement class (Pet. at 25-26), the court of appeals rejected this argument in dismissing another appeal:

> The Davidsons argue that the reaching of a settlement in effect made this class action a settlement class action, so that the notice requirements for a settlement class action set forth in *In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 792 (3d Cir. 1995), apply here. We disagree.
>
> This was not a settlement class action but a previously certified class action that settled.

Pet. App. 79a – 80a (emphasis added). Further highlighting the differences between a litigated securities law class and the situation in *Amchem*, the Eighth Circuit court stated:

> The difficulties associated with settlements like those in *Amchem* and *Ortiz* – the possibility of "collusion between class counsel and the defendant . . . [and] the need for additional protections when the settlement is not negotiated by a court designated class representative," – are therefore not present here. . . . The district court still had the benefit of the parties' extensive trial preparation, and the definition of the mandatory class was the same as the definition of the class originally certified under Fed. R. Civ. P. 23(b)(3) (although, obviously, the mandatory class also included those

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certification of a sub-class, especially where claimed distinction that certain class members had suffered distinct and greater damages was found to be "unsupported by the facts of the case").

> who opted out of the class litigation with respect to compensatory relief).

Petrovic, 200 F.3d at 1146 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998)).

In this case, the district court certified the Class nearly one year before the settlements were reached. The Class was certified during litigation; there was a clear common course of conduct that led to common issues of fact and law that predominated over any individual issues; the claims of the Lead Plaintiff were typical of the claims of absent class members; and the interests of the Lead Plaintiff were not adverse to the interests of any absent class member. *See* Pet. App. 185a – 186a. Thus, the problems with settlement classes or future injured claimants present in *Amchem* are inapplicable.

In short, the judgment below does not conflict with any decision by this Court or with any decisions in other courts of appeals.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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